No. 83-56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services may be estopped from recovering excess payments made to a provider of health care services under the Medicare program on the ground that a fiscal intermediary previously had advised the provider that the payments were allowable.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Ada Werner, Frank E. Werner, and Shirley Sorger were appellants and the Travelers Insurance Companies was an appellee in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 698 F.2d 615. The opinions of the district court (Pet. App. 36a-48a) and the Provider Reimbursement Review Board (Pet. App. 49a-54a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on January 19, 1983. A petition for rehearing was denied on February 14, 1983 (Pet. App. 34a-35a). By order dated May 6, 1983, Justice Brennan extended the time within which to

file a petition for a writ of certiorari to and including July 14, 1983. The petition was filed on that date and was granted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 1815(a) of the Social Security Act, 42 U.S.C. 1395g(a), provides:

> The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it, and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) and prior to audit or settlement by the General Accounting Office, from the Federal Hospital Insurance Trust Fund, the amounts so determined, with necessary adjustments on account of previously made overpayments or underpayments; except that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider under this part for the period with respect to which the amounts are being paid or any prior period.

Section 1861(v)(1)(A) of the Social Security Act, 42 U.S.C. 1395x(v)(1)(A), provides in part that the Secretary's regulations governing the determination of the reasonable cost of services shall

> provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of de-

termining costs proves to be either inadequate or excessive.

42 C.F.R. 405.423 provides in part:

(a) *Principle.* Unrestricted grants, gifts, and income from endowments should not be deducted from operating costs in computing reimbursable cost. Grants, gifts, or endowment income designated by a donor for paying specific operating costs should be deducted from the particular operating cost or group of costs.

* * * * *

(c) *Application.*

* * * * *

(2) Donor-restricted funds which are designated for paying certain hospital operating expenses should apply and serve to reduce these costs or group of costs and benefit all patients who use services covered by the donation. If such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including the title XVIII health insurance program.

* * * * *

42 C.F.R. 405.1885 provides in part:

(a) A determination of an intermediary, a decision by a hearing officer or panel of hearing officers, a decision by the Board, or a decision of the Secretary may be reopened with respect to findings on matters at issue in such determination or decision, by such intermediary officer or panel of hearing officers, Board, or Secretary, as the case may be, either on motion of such intermediary officer or panel of hearing officers,

Board, or Secretary, or on the motion of the provider affected by such determination or decision to revise any matter in issue at any such proceedings. Any such request to reopen must be made within 3 years of the date of the notice of the intermediary or Board hearing decision, or where there has been no such decision, any such request to reopen must be made within 3 years of the date of notice of the intermediary determination. No such determination or decision may be reopened after such 3-year period except as provided in paragraphs (d) and (e) of this section.

(b) A determination or a hearing decision rendered by the intermediary shall be reopened and revised by the intermediary, if, within the aforementioned 3-year period, the Health Care Financing Administration notifies the intermediary that such determination or decision is inconsistent with the applicable law, regulations, or general instructions issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the intermediary.

STATEMENT

1. Title XVIII of the Social Security Act, 42 U.S.C. (& Supp. V) 1395 *et seq.*, establishes Medicare, a two-part program of federal assistance for the medical care of the aged and disabled. Part A of the program provides "hospital insurance" benefits for inpatient hospital care and post-hospital extended or home health care and is financed by Social Security payroll contributions. 42 U.S.C. (& Supp. V) 1395c-1935i-2. Part B of the program provides "medical insurance" benefits for physician services and outpatient services and supplies and is financed by the premium payments of those enrolled together

with contributions from funds appropriated by Congress. 42 U.S.C. (& Supp. V) 1395j-1395w. Both parts of the Medicare program are administered by the Health Care Financing Administration (HCFA), a part of the Department of Health and Human Services (HHS). This case involves only Part A of the program.

The principal providers of health care services under Part A are hospitals, skilled nursing facilities, and home health care agencies. Provider participation in the Medicare program is voluntary. Instead of reimbursing Part A Medicare beneficiaries directly, the Secretary of HHS pays the provider for the health care services it has rendered to beneficiaries. The Medicare statute provides for reimbursement only for the "reasonable cost of any services" rendered to Medicare beneficiaries, defined as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v)(1)(A). See also 42 U.S.C. (Supp. V) 1395f(b). Congress has given the Secretary express statutory authority to establish the methods for determining "reasonable costs" for services. See 42 U.S.C. 1395x(v)(1)(A). In addition, Congress has delegated to the Secretary general authority to prescribe regulations necessary to carry out the administration of the Medicare program. 42 U.S.C. 1395hh. The Secretary has exercised this statutory authority by promulgating regulations, 42 C.F.R. Pt. 405 *et seq.*, and a series of Health Insurance Manuals.

Congress created a system of interim payments to Medicare providers and subsequent readjustments to reflect actual costs. A provider receives interim payments at least monthly for its estimated reasonable

costs incurred in furnishing services to Medicare beneficiaries. 42 U.S.C. (& Supp. V) 1395f, 1395g. A provider's annual cost report is audited later to determine the actual costs incurred. See 42 C.F.R. 405.454, 405.1803. Under such an interim payment system it is likely that health care providers will receive overpayments or underpayments at various times. Therefore, Congress instructed the Secretary to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." 42 U.S.C. 1395x(v)(1)(A)(ii). In addition, Congress provided that interim payments to providers shall include "necessary adjustments on account of previously made overpayments or underpayments." 42 U.S.C. 1395g(a). In response to these congressional directives, the Secretary has issued regulations that provide for the reopening, within a three year period, of any reimbursement determination made by a fiscal intermediary, a hearing officer, the Provider Reimbursement Review Board (PRRB), or the Secretary herself. 42 C.F.R. 405.1885.

Under the Medicare program, a provider may choose to deal with the Secretary through a nongovernmental organization (frequently a private insurance company), known as a "fiscal intermediary." 42 U.S.C. (& Supp. V) 1395h. Such intermediaries, which are nominated by providers, enter into agreements with the Secretary and act on behalf of the Secretary in certain respects. See 42 C.F.R. 421.5(b). The intermediary makes interim payments to the provider for the reasonable cost of services supplied to Medicare beneficiaries and audits the provider's

cost reports. Under the statute the intermediary may also "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary." 42 U.S.C. (Supp. V) 1395h(a)(2)(A). An intermediary must reopen and revise any prior determination if, within a three-year period, HCFA notifies the intermediary that the determination is inconsistent with applicable law, regulations, or general instructions issued by the Secretary. 42 C.F.R. 405.1885(b).

When an intermediary is required to reopen and revise one of its earlier determinations it provides notice to the provider in the form of a "Notice of Program Reimbursement." The notice explains the basis for the revision and offers the provider the opportunity to respond by presenting additional evidence or argument. 42 C.F.R. 405.1887. If the provider disagrees with the Notice of Program Reimbursement, and the amount in issue is less than $10,000, it may request an intermediary hearing. 42 C.F.R. 405.1809 *et seq.* If the amount in issue exceeds $10,000, the provider may appeal the matter to the PRRB. 42 U.S.C. (& Supp. V) 1395*oo*; 42 C.F.R. 405.1835. In the PRRB proceeding the provider is entitled to prehearing discovery and a prehearing conference as well as a full hearing. 42 C.F.R. 405.1851 *et seq.* The Secretary may review a decision of the PRRB and may affirm, modify or reverse. A provider may seek judicial review of the Secretary's decision in the appropriate federal district court. 42 U.S.C. (& Supp. V) 1395*oo*(f).

2. Respondent Community Health Services of Crawford County, Inc. (CHS) is a provider of health

care services and has participated in the Medicare program since 1966. CHS chose to have its Medicare payments made through a fiscal intermediary, Travelers Insurance Companies (Travelers). In 1975 CHS began to receive grant funds under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (& Supp. V) 801 *et seq.*, a federal program designed to "provide job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons * * *." 29 U.S.C. (Supp. V) 801.[1] CHS employed CETA workers, whose salaries and fringe benefits were paid with the federal CETA funds CHS received. CHS included in its Medicare cost reports for 1975, 1976 and 1977 the amount of salaries and fringe benefits paid to CETA workers; however, it did not offset against these costs the federal CETA funds it had received to cover the salaries and benefits. Pet. App. 3a-5a. Accordingly, when it obtained Medicare reimbursement on the basis of its cost reports, CHS in effect received a second, duplicate federal payment for the expenses of the CETA workers.

One of the Secretary's regulations relating to determination of reasonable costs, 42 C.F.R. 405.423(a), provides that grants received by a provider for the purpose of paying specific operating costs "should be deducted from the particular operating cost or group of costs" in computing reimbursable costs. That regulation reflects the principle that a provider may not be reimbursed twice for the same expense. See 42 C.F.R. 405.423(c)(2) ("[i]f such costs are not reduced, the provider would secure reimbursement for

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[1] Congress repealed the provisions of CETA as of October 13, 1982, the date of enactment of the Job Training Partnership Act. Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357.

the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including [Medicare]"). Section 612 of the Medicare Provider Reimbursement Manual[2] carves out a limited exception to this offset rule; when an earmarked grant constitutes "seed money," the funds need not be offset against the costs for which they are designated. Seed money grants are defined as "[g]rants designated for the development of new health care agencies or for expansion of services of established agencies * * *." Medicare Provider Reimbursement Manual, HIM-15, Pt. I, § 612.2, reproduced in 1 Medicare & Medicaid Guide (CCH) ¶ 5461 (Aug. 1968).

CHS filed its cost reports after consulting with Travelers, its fiscal intermediary, concerning the question of offset of CETA funds. On several occasions, from 1975 to August 1977, Travelers' Medicare Manager, Michael Reeves, orally advised CHS that CETA funds constitute "seed money" and therefore need not be deducted from reimbursable costs in preparing CHS Medicare cost reports.[3] Neither Reeves nor CHS consulted with HCFA concerning

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[2] The Medicare Provider Reimbursement Manual, issued by the Secretary, supplements the Secretary's regulations published in the Code of Federal Regulations. The Manual provides more detailed guidance concerning Medicare reimbursement principles.

[3] The court of appeals stated (Pet. App. 2a, 13a) that Reeves gave CHS this advice on five separate occasions. Neither the PRRB nor the district court made such a finding. During the PRRB hearing, witnesses for CHS and for Travelers differed in their recollections of the number of times Reeves had given such advice. Compare Tr. 73 (PRRB Record at 146) (testimony of John Wallach) with Tr. 122-125 (PRRB Record at 196-199) (testimony of Michael Reeves).

offset of CETA funds during this period. Pet. App. 5a.

In August 1977 Travelers sent a written inquiry to HCFA raising the question whether CETA funds constitute "seed money" and thus are exempt from the general principle of offset. In September 1977 HCFA advised Travelers in writing that if costs of CETA participants are included in the Medicare cost report, CETA funds received by the provider must be offset against those costs. Reeves informed CHS of HCFA's advice by letter (Oct. 7, 1977) and in person (Nov. 9, 1977). Pet. App. 6a. Nevertheless, CHS did not offset the CETA funds in its cost report for the year 1977, which it submitted in February 1978. Travelers proceeded to adjust the 1977 cost report to reflect the receipt of CETA funds. *Id.* at 50a.

In June 1978 Travelers sent CHS written notice that its failure to offset CETA funds had resulted in overpayments for 1975, 1976 and 1977 amounting to $71,480 (C.A. App. 25a-28a). The notice informed CHS of the possibility of establishing an extended repayment schedule if CHS could provide adequate documentation supporting its financial condition and a proposed schedule of payments (*id.* at 25a, 33a). Following receipt of this notice, CHS and three individual recipients of home health care services provided by CHS (respondents Ada Werner, Frank E. Werner, and Shirley Sorger) filed a civil action in the United States District Court for the Western District of Pennsylvania, seeking to enjoin the Secretary from recouping the overpayments. On August 10, 1978, the district court granted a temporary restraining order requiring the Secretary to refrain from recoupment of the overpayments. Pet. App. 7a.

CHS then pursued its administrative remedies before the PRRB.[4]

On March 12, 1980, following an evidentiary hearing, the PRRB ruled that CETA grants do not constitute seed money and must be offset against costs, as required by 42 C.F.R. 405.423 (Pet. App. 49a-54a). While acknowledging CHS's claim that its failure to offset CETA funds was due to the advice it received from the intermediary, the PRRB declined to sanction the failure to offset. It pointed out that "advice by the Intermediary cannot be a substitute for the opinion of the Secretary" (*id.* at 54a).[5]

CHS sought review of the PRRB decision in district court, contending that CETA funds constitute seed money, that it had been denied a full and complete review of the issues, that the Secretary was estopped from recouping any overpayments, that the Secretary should have waived recovery, and that Travelers was independently liable for the overpay-

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[4] Pursuant to a stipulation between the parties, the Secretary has refrained from recouping the overpayments during the pendency of the administrative proceeding and judicial review and has refunded the amounts previously recouped (C.A. App. 107a-108a).

[5] However, the PRRB reversed the proposed adjustments to the 1975 and 1976 cost reports, because the provider had not been given proper notice of reopening (Pet. App. 8a, 53a-54a). The notice for the year 1976 was reissued in compliance with the applicable regulations, but the notice for the year 1975 could not be reissued, since the three year reopening period provided by the regulations had passed. Accordingly, the total amount of adjustment was reduced to $63,839, representing the overpayments for 1976 and 1977. *Id.* at 8a.

The Secretary chose not to review the PRRB decision in this case. Thus, it constituted the final decision of the Secretary.

ments. The district court rejected each of CHS's contentions and granted the Secretary's motion for summary judgment (Pet. App. 36a-48a). The court found that 42 C.F.R. 405.423(a), which governs earmarked grants and gifts, and the Medicare Provider Reimbursement Manual supported the Secretary's ruling that CETA grants are not seed money and that the costs claimed by CHS are not allowable. It concluded that CETA funds plainly are not "designated for the development of new health care agencies" and that "no tortured construction" could bring CETA grants within the seed money exception (Pet. App. 40a).

The district court also rejected CHS's estoppel argument. The court suggested that estoppel may lie against the government "in certain limited circumstances" (Pet. App. 41a). However, it ruled that any estoppel contention was defeated by the existence of the Secretary's regulation permitting the reopening of reimbursement determinations within a three year period and the obvious fact that CHS was being reimbursed twice for the same expense. The court stated (*id.* at 42a):

> The Medicare regulations allow the intermediary to reopen the cost reports up to three years after they have been approved. Thus, CHS relied at its own risk in accepting the intermediary's advice since plaintiff was on notice that all such reports were subject to review. Moreover, the fact that CHS was being reimbursed twice for the same expense should have been a red flag that its windfall was not supportable under the Act.

Finally, the district court rejected CHS's claims that it had not received a full review before the

PRRB, that the Medicare statute entitled it to waiver of the overpayments, and that Travelers was independently liable to CHS for the failure to render accurate advice concerning the treatment of CETA funds. The court held that mistakes of judgment do not constitute activity outside the intermediary's scope of authority when such mistakes in the treatment of cost items were anticipated by the reopening provision of 42 C.F.R. 405.1885. The court found "no evidence of willful or wanton misconduct" by Reeves. Pet. App. 46a.

3. A divided panel of the court of appeals reversed (Pet. App. 1a-33a). Although it recognized the traditional reluctance of courts to estop the government, the court of appeals nonetheless held that the Secretary should be estopped from recovering the overpayments made to CHS.

The court of appeals viewed this Court's decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), as supporting the principle that "estoppel may be properly applied against the government under certain circumstances" (Pet. App. 10a). In addition, the court concluded that the Court's decisions in *INS* v. *Hibi*, 414 U.S. 5 (1973), and *Montana* v. *Kennedy*, 366 U.S. 308 (1961), gave "tacit recognition" to the use of estoppel against the government upon a finding of "affirmative misconduct." The court characterized *Schweiker* v. *Hansen* as implying "that one example of affirmative misconduct is the failure of a government employee to perform an act that is required by law" (Pet. App. 11a) and concluded that Travelers had engaged in such "affirmative misconduct." The court reasoned that the intermediary had an unambiguous duty, imposed by statute and its agreement with the Secretary, to communicate to the

Secretary at an early date the provider's inquiry regarding CETA funds, and that had the intermediary performed this "legally binding procedure," CHS would not have been misled (*id.* at 15a-16a).

The court of appeals distinguished this Court's decisions regarding estoppel on various grounds (Pet. App. 16a-21a). It distinguished *FCIC* v. *Merrill*, 332 U.S. 380 (1947), on the ground that there was "no source to which CHS could have gone to ascertain whether the government agent's advice was wrong" (Pet. App. 17a). The court dismissed 42 C.F.R. 405.423, the Secretary's regulation requiring the offset of earmarked grants against costs, as possessing "no clear meaning" (Pet. App. 17a). The court did not mention either the requirement of 42 U.S.C. (& Supp. V) 1395g that there be retroactive adjustments to account for overpayments or underpayments to providers or 42 C.F.R. 405.1885, the Secretary's regulation authorizing reopening of intermediary reimbursement determinations within three years. Instead, the court emphasized "the injustice to CHS and the people it serves if it is required to refund the alleged overpayments" (Pet. App. 21a), remarking that the excess Medicare funds received by CHS had been used "to meet serious human needs" (*ibid.*).

Judge Meanor dissented (Pet. App. 23a-33a). In his view, the government cannot be estopped when the result would be to "render to the opponent a benefit to which he was never substantively entitled" (*id.* at 24a). Judge Meanor found this Court's decision in *FCIC* v. *Merrill* to be controlling: "The only difference between *Merrill* and this case is that here the plaintiffs have received the funds in dispute, whereas in *Merrill* the insurance proceeds never were paid. I can think of no way in which this factual dif-

ference can lead to a principled distinction." Pet. App. 26a. Judge Meanor concluded that estopping the government in a case like this one "amounts to no more than a court authorized raid on the public treasury" (*id.* at 32a).

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the Secretary of Health and Human Services may be estopped from recovering excess Medicare payments made to respondent CHS on the ground that a fiscal intermediary had advised CHS that the costs at issue were reimbursable.

1. This Court has consistently held that the federal government may not be equitably estopped from enforcing the laws. This doctrine is grounded on both strong policy considerations and constitutional principles. It protects the public from the consequences of erroneous conduct by government employees and ensures that the Executive faithfully carries out legislative mandates by preventing actions of agency representatives from overriding the will of Congress.

The rule against estoppel of the federal government has particular force in cases like this one, in which the result of estoppel would be to require the expenditure of public funds contrary to the express directions of Congress. Here the results of estoppel are to override the Secretary's statutorily authorized determination of "reasonable cost," to allow CHS a double recovery of federal funds for the same expense, and to nullify the procedure Congress has mandated for recovery of Medicare overpayments. The court of appeals' decision clearly contravenes this Court's injunction " 'to observe the conditions defined by Con-

gress for charging the public treasury.'" *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981), quoting *FCIC v. Merrill*, 332 U.S. 380, 385 (1947).

2. Even if estoppel of the government were proper in some cases, it would not be appropriate here. As a threshold matter, CHS failed even to establish that it satisfied the requirements for estoppel of a private party, including reasonable reliance and detriment.

a. Reliance on erroneous advice can never be reasonable where, as here, there is an express statutory provision mandating correction of erroneous determinations and recovery of overpayments. Both the Medicare statute and the Secretary's regulations establish a system of interim payments and subsequent audit and recovery of payments that are found to be inconsistent with applicable law, regulations, or HCFA instructions. Thus, it is clear from the statute and regulations that the intermediary did not have the authority to make final determinations.

Reliance on erroneous advice also can never be reasonable where the advice on its face appears to be inconsistent with written regulations or guidelines. Here the intermediary's advice concerning treatment of the expenses of CETA employees appeared to conflict with the Secretary's published regulation concerning offset of donor-restricted funds and her written instructions concerning the "seed money" exception; in addition, the advice led to double reimbursement—the situation against which the regulation was expressly directed.

b. CHS also failed to demonstrate that it would suffer detriment in the absence of estoppel. The only harm CHS alleged—repayment of funds it was never entitled to receive—simply cannot qualify as detriment for purposes of estoppel. Nor can CHS's expenditure of the excess Medicare funds for non-

Medicare purposes or its allegation that it would have to cut services to its clients if it were required to repay the funds transform repayment into the sort of detriment that would justify estopping the government from recovering the funds.

3. a. Even if estoppel of the government were proper in some circumstances and CHS made a threshold showing that would support estoppel of a private party, CHS still could not prevail in this case. On several occasions this Court has declined to decide whether there might be an exception to the general rule against estoppel of the federal government for cases in which there has been "affirmative misconduct" by a government representative. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. at 788. In our view, there should be no such "affirmative misconduct" exception.

Estoppel in the case of "affirmative misconduct" presents the same dangers that prompted the general rule against estoppel of the government. Indeed, the more egregious the conduct of a government employee, the less reasonable it is to attribute that conduct to the government and to prohibit the government from insisting on compliance with valid statutes or regulations. In addition, the concept of "affirmative misconduct" has no fixed content and, as a result, has encouraged both needless litigation and erroneous decisions.

b. In any event, the facts of this case clearly would not fit an "affirmative misconduct" exception. The intermediary's erroneous advice was at most negligent or a mistake in judgment. The intermediary's conduct was similar to that at issue in cases such as *Schweiker* v. *Hansen*, *supra*, and *FCIC* v. *Merrill*, *supra*, in which this Court declined to estop the government.

ARGUMENT

THE SECRETARY OF HEALTH AND HUMAN SERVICES MAY NOT BE ESTOPPED FROM RECOVERING EXCESS MEDICARE PAYMENTS MADE TO CHS ON THE GROUND THAT A FISCAL INTERMEDIARY PREVIOUSLY HAD ADVISED CHS THAT THE PAYMENTS WERE ALLOWABLE

The court of appeals held that the Secretary of HHS may be estopped from recovering Medicare funds erroneously paid to CHS as reimbursement for certain costs on the ground that a fiscal intermediary, the Travelers Insurance Companies, had advised CHS that those costs were reimbursable under the Medicare statute. The court reached this result despite the facts that CHS was not entitled to receive the funds under the Medicare statute and regulations and that Congress has expressly directed the Secretary to recover overpayments made to Medicare providers. This decision is plainly erroneous.

A. This Case Is Governed By The Reasonable And Well-Established Principle That The Government May Not Be Estopped From Enforcing The Laws

This Court has consistently and repeatedly held that the federal government may not be equitably estopped from enforcing the public laws, even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National*

Bank v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *FCIC* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982). The government is "neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. at 409. We know of no decision of this Court holding that equitable estoppel lies against the government in any circumstance.[6] The rule against

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[6] In several cases (*e.g.*, *INS* v. *Miranda*, slip op. 5; *Schweiker* v. *Hansen*, 450 U.S. at 788) the Court has expressly declined to determine whether the government could be estopped in a case involving serious affirmative misconduct by government employees. However, the Court has never identified a case in which the facts established such misconduct. See pages 36-43, *infra*, for discussion of a possible "affirmative misconduct" exception to the rule against estopping the government.

Professor Davis has cited *Moser* v. *United States*, 341 U.S. 41 (1951), as inconsistent with the numerous decisions barring estoppel of the federal government. 4 K. Davis, *Administrative Law Treatise* § 20:4 (2d ed. 1983). See also, *e.g.*, *United States* v. *Lazy FC Ranch*, 481 F.2d 985, 988-989 (9th Cir. 1973). However, *Moser* does not appear to involve the issue of estoppel. In *Moser* the Court concluded that the petitioner in that case should not be held to have lost his opportunity for citizenship despite the facts that he had sought exemption from military service on the ground that he was a neutral alien and that the Selective Training and Service Act of 1940 provided that those who claimed such an exemption would be barred from citizenship. The Court expressly declined to base its decision on principles of estoppel. 341 U.S. at 47. Instead, it held that Moser had not knowingly and intentionally waived

estoppel of the government has been applied to misrepresentations of law (*Schweiker* v. *Hansen*), misrepresentations of fact (*Lee* v. *Munroe*), oral misrepresentations (*Utah* v. *United States*), written misrepresentations (*Lee* v. *Munroe*), misrepresentations in the form of longstanding administrative rulings (*Automobile Club* v. *Commissioner*), and off-hand remarks by government employees (*Montana* v. *Kennedy*). The principle clearly applies to the intermediary's erroneous advice in this case.

The doctrine that the government may not be equitably estopped from enforcing the laws is grounded in reason and necessity and, ultimately, on constitutional principles. The doctrine serves the public interest by protecting the government (and the public treasury) from the consequences of errors by misinformed employees and representatives. Without such protection, there can be no assurance that the Executive will be able to fulfill its constitutional responsibility by faithfully executing the duties assigned to it by Congress. As this Court stated in what is perhaps the earliest case involving a claim of estoppel against the government, "[i]t is better that an individual should now and then suffer by * * * mistakes [of government officials], than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself." *Lee* v. *Munroe*, 11 U.S. at

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his rights to citizenship, since he had followed a revised procedure for exemption under which the Department of State had deleted the express waiver of citizenship from the applicable form. The fact that this Court has never cited *Moser* in any subsequent case involving a claim of estoppel against the government confirms the view that the holding in that case does not bear on the question of estoppel.

370. Accord, *Whiteside* v. *United States*, 93 U.S. 247, 257 (1876); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 681 (1868).

The rationale for the doctrine that the government may not be equitably estopped is the same as that for the rule that (except where Congress otherwise provides) the sovereign is exempt from the consequences of its laches and from the operation of statutes of limitations: "Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea * * * it precludes * * *." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938). Such doctrines are based on "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *United States* v. *Hoar*, 26 F.Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (Story, Circuit Justice). See also *Costello* v. *United States*, 365 U.S. 265, 281 (1961).

Rules such as these are essential because it is simply impossible for the federal government to exercise complete control over every one of its employees and agents. Despite good faith efforts to avoid mistakes, the government cannot eradicate completely the instances in which it will be necessary to overrule some erroneous advice or action by an employee on which a private party may have relied. Indeed, over 150 years ago, when there were only a fraction of the present number of government employees, Justice Story observed that the government's "fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not

save the public from the most serious losses," if equitable doctrines applicable to private suits were to govern. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824). See also *Dox* v. *Postmaster-General*, 26 U.S. (1 Pet.) 318, 325-326 (1828) (Marshall, C.J.).

The principle that the government may not be equitably estopped has its roots in the constitutional doctrine of separation of powers, as well as in the doctrine of sovereign immunity. If the judiciary were free to impose otherwise unauthorized liability on the government, based only on its own notions of equity, the mandates of Congress could easily be overridden. The effect of estopping the government is to raise employees and other representatives of the Executive Branch to the status of legislators by giving their representations the force of law, in preference to the conditions established by Congress itself. The Court has rejected such a result. See, *e.g.*, *Dixon* v. *United States*, 381 U.S. 68, 73 (1965) (IRS Commissioner's erroneous tax rulings); *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950) (agreement by Solicitor General concerning substitution of successor after expiration of statutory period); *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940) (administrative interpretations of the Department of the Interior).

This doctrine applies with special force in cases like this one, in which the result of estopping the government is to require expenditure of public funds contrary to the express mandate of Congress. See U.S. Const., Art. 1, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Such cases implicate the core of the concerns that underlie the doctrine. Here Congress expressly limited Medicare re-

imbursement to the "reasonable cost" of services provided and delegated to the Secretary the authority to promulgate rules defining that term. 42 U.S.C. 1395x(v)(1)(A). The Secretary complied with this directive by, inter alia, excluding from the definition of "reasonable cost" those expenses that are offset by donor-restricted funds, in order to avoid double reimbursement. See pages 8-9, *supra*. CHS nevertheless submitted cost reports in which it claimed reimbursement for salaries and fringe benefits of CETA employees, but failed to offset the federal CETA funds it had received to cover those expenses. Because CETA funds are not within the seed money exception to the Secretary's offset rule,[7] the reimbursement CHS claimed and received exceeded the "reasonable cost" of services provided, so that it received more than the amount to which it was entitled under the Medicare statute. In fact, CHS received Medicare funds to cover costs that already had been reimbursed by funds it received under a different federal program (CETA). The Secretary, again pursuant to Congress's explicit direction, reopened CHS's cost reports, adjusted them to account for the failure to offset, and took steps to recover the overpayments.

The result of the court of appeals' decision to estop the government in this case is to override the Secre-

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[7] Both the PRRB and the district court concluded that the CETA funds received by CHS clearly could not be characterized as "seed money" as that term is used in the Medicare program (Pet. App. 39a-40a, 52a-53a), and the court of appeals declined to rule on this question (*id.* at 23a). For purposes of deciding the issue of estoppel, which is the only issue decided by the court of appeals and presented to this Court, it must be assumed that the PRRB and the district court correctly concluded that CETA funds do not come within the seed money exception.

tary's statutorily authorized determination of "reasonable cost," to allow CHS a double recovery of federal funds for the same expense, and to nullify the procedure Congress has mandated for the recovery of Medicare overpayments. The decision in effect elevates the intermediary's advice over the express will of Congress, to the detriment of federal taxpayers. Estoppel of the government in these circumstances contravenes this Court's injunction to the lower courts to be careful " 'to observe the conditions defined by Congress for charging the public treasury.' " *Schweiker* v. *Hansen*, 450 U.S. at 788, quoting *FCIC* v. *Merrill*, 332 U.S. at 385. As Judge Meanor observed (Pet. App. 32a), it "amounts to no more than a court authorized raid on the public treasury."

This case illustrates the reasonableness of the rule against estopping the government. Permitting estoppel in cases like this one has serious ramifications for government operations. By permitting CHS to retain funds to which it is not entitled, contrary to the terms of the Medicare statute and the Secretary's lawful regulations, the court of appeals has opened the door to countless claims by providers, each of which may allege that it was orally advised by its fiscal intermediary that it was appropriate to claim reimbursement for certain costs. The reasoning of the court of appeals is not confined to the Medicare program. There are many other federal programs that involve distribution of federal funding in the form of grants, benefits, loans, or guarantees (including other massive social welfare programs created by the Social Security Act). Congress set up many of these programs so that funds are paid out on an ongoing basis, prior to any detailed audit of expenditures. Efficient operation of such programs and protection of the public

fisc requires that there be a system of interim or advance payments, with subsequent recovery of erroneous overpayments.

It would lead to intolerable burdens and would require the expenditure of substantial sums of public monies, contrary to the dictates of Congress, if recipients could retain federal funds to which they were not statutorily entitled whenever they had claimed the funds following receipt (or alleged receipt) of incorrect advice from a government representative. As the Second Circuit has observed, "[t]he government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress." *Goldberg* v. *Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977). Thus, this Court's doctrine precluding estoppel of the government—supported by important public policy and constitutional considerations—should apply to bar estoppel in this case.

We note that the doctrine that the government may not be equitably estopped does not mean that private parties never have a remedy in cases in which they have reasonably relied to their detriment on a government employee's erroneous advice. Congress itself has provided that in some types of cases the government may be bound by its agents' representations. For example, Section 9 of the Portal-to-Portal Act of 1947, 29 U.S.C. 258, which relates to wage-hour violations occurring before May 14, 1947, permits reliance on the advice of "any agency of the United States," whether the advice was by regulation, ruling, order, approval, interpretation, administrative practice or enforcement

policy. In other cases, Congress has enacted provisions giving federal agencies the discretion to waive certain statutory requirements when the agencies conclude that circumstances make it equitable to do so. Congress has included a number of such waiver provisions in the Social Security Act. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682 (1979) (construing 42 U.S.C. (& Supp. V) 404, a provision for waiver of recoupment under Title II of the Social Security Act). See also 442 U.S. at 693-694 n.9 (listing other waiver provisions under various statutes). Indeed, the Medicare statute provides for waivers of recoupment in cases of overpayments arising from noncovered or excluded services (42 U.S.C. 1395gg(b) and (c)). See Pet. App. 42a-44a. However, Congress has not provided for waivers in cases like this one, involving recoupment of overpayments to providers arising from erroneous "reasonable cost" determinations. See *id.* at 44a. The inclusion of waiver provisions applicable to some situations suggests that Congress did not mean for the courts to impose similar sorts of remedies in other types of cases. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981). In view of Congress's decision to provide for waiver of recoupment in some types of Medicare cases, but not in respondent's situation, the rule against estoppel of the government should apply with particular strength.

B. Even If The Government May Be Estopped In Some Circumstances, Estoppel Is Clearly Inappropriate In This Case Because CHS Failed Even To Establish That It Satisfied The Requirements For Estoppel Of A Private Party

Assuming arguendo that the Court should decide to depart from the well-established principle that the government may not be equitably estopped, estoppel

nonetheless is inappropriate here because CHS did not even make the necessary threshold showing, *i.e.*, that the circumstances of this case satisfy the requirements for estoppel under the law applicable to private parties. There can be no question that a court should not even consider estopping the federal government if the opposing party has not made a showing that would support equitable estoppel of a private party. See, *e.g.*, *Wilber National Bank* v. *United States*, 294 U.S. 120, 124 (1935); *Pratte* v. *NLRB*, 683 F.2d 1038, 1043-1044 (7th Cir. 1982). Thus, it seems reasonable to expect that a court, before reaching the question whether the government may be estopped, would consider first whether a party has established facts that would justify estoppel in purely private litigation.[8]

The court of appeals ignored this threshold requirement. Although the court below recognized that it is necessary to show both reasonable reliance on a misrepresentation and detriment in order to support the application of equitable estoppel (see Pet. App.

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[8] Despite the reasonableness of this approach, lower courts sometimes fail to determine initially whether the party urging estoppel has made such a showing. See, *e.g.*, *Fox* v. *Morton*, 505 F.2d 254 (9th Cir. 1974); *Parrish* v. *Loeb*, 558 F. Supp. 921 (C.D. Ill. 1982); *Dempsey* v. *Director, FEMA*, 549 F. Supp. 1334 (E.D. Ark. 1982). In other cases, lower courts appear to apply a loose version of the traditional standards—one that is far less favorable to the government than to a private party in a similar position. See, *e.g.*, *Home Savings & Loan Ass'n* v. *Nimmo*, 695 F.2d 1251 (10th Cir. 1982), petition for cert. pending, No. 83-277. But the considerations described in the preceding section indicate rather that courts should take particular care in determining whether a party seeking to estop the government has established the traditional elements of estoppel.

9a),[9] the court did not stop to determine whether CHS had made an adequate showing with respect to either of these traditional elements of estoppel. Instead, it proceeded to consider whether existing case law concerning estoppel of the government left room for estoppel of the Secretary in the circumstances of this case. But it seems clear that CHS failed to prove either reasonable reliance or detriment. Thus, the court of appeals need never have reached the issue of when estoppel of the government may be justified.

1. The element of reasonable reliance on the advice of a government agent can never exist where, as here, there is an express statutory provision for correction of erroneous determinations and recovery of overpayments. The existence of such a provision clearly indicates to every person covered by the statute that initial decisions are subject to change when errors are discovered and that funds paid out erroneously may be taken back.

Congress anticipated reimbursement errors under the Medicare payment scheme and expressly directed the Secretary to make necessary adjustments in reimbursement "on account of previously made overpayments or underpayments" (42 U.S.C. 1395g(a)) and to "provide for the making of suitable retroactive corrective adjustments" in the case of under-

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[9] A number of courts describe the traditional test for estoppel of a private party as follows: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct be acted on or must act in such a way that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must have been ignorant of the facts; and (4) the party asserting estoppel must have reasonably relied on the other party's conduct to his substantial injury. *Pratte* v. *NLRB*, 683 F.2d at 1041.

payments or overpayments to a provider (42 U.S.C. 1395x(v)(1)(A)). All providers, including CHS, presumably are aware of this statutory system of interim payments and subsequent audit and recovery of overpayments. In addition, the Secretary, in response to Congress's directives, has promulgated regulations that make clear that any determination by a fiscal intermediary is subject to reopening and revision within a three-year period, on the basis that it has been found to be inconsistent with applicable law, regulations, or general instructions issued by HCFA (42 C.F.R. 405.1885). Both statutory and administrative provisions thus plainly state that the Secretary and the courts have the final word on what payments to providers are permissible under the Medicare statute.

Under such a statutory scheme a provider could never *reasonably* rely on an intermediary's advice because it is clear that the intermediary does not have the authority to make any final determination concerning the interpretation of statutes, regulations or instructions or otherwise to bind the Secretary through erroneous advice. CHS, which had become a Medicare provider voluntarily almost a decade before the events at issue here, surely was aware of the risks and responsibilities it assumed under the statutory scheme, as well as the benefits involved. As the district court observed (Pet. App. 42a), in view of the regulation providing for reopening of cost reports, "CHS relied at its own risk in accepting the intermediary's advice since [CHS] was on notice that all such reports were subject to review." [10]

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[10] See *Woodstock/Kenosha Health Center* v. *Schweiker*, 713 F.2d 285, 291 (7th Cir. 1983) (it is particularly inappropriate "to apply the * * * equitable [estoppel] doctrine to protect

There is an additional reason why CHS's reliance cannot be characterized as reasonable: the intermediary's oral advice on its face appeared inconsistent with the Secretary's published regulations and written instructions. In compliance with Congress's directive that she promulgate regulations defining the "reasonable cost" of services provided under Medicare (42 U.S.C. 1395x(v)(1)(A)), the Secretary has required that grants earmarked for paying specific operating costs be offset against those costs for purposes of Medicare provider claims (42 C.F.R. 405.423 (a) and (c)(2)). The regulation states clearly (42 C.F.R. 405.423(c)(2)) that it is designed to avoid situations in which a provider receives double re-

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skilled professionals operating in their area of expertise with the government on an intimate and long-term basis").

The court of appeals was plainly wrong in suggesting (Pet. App. 5a, 13a, 18a-19a) that CHS had no choice but to seek and follow the advice of the intermediary, or that CHS was "induced" to claim the excess funds. CHS was not obliged to accept unquestioningly the intermediary's advice or to act on it, especially when the advice on its face appeared to conflict with written regulations and guidelines (see pages 30-32, *infra*). When it is clear that erroneous advice will lead to overpayments and that the statute and regulations provide for recovery of such overpayments, the provider must exercise independent judgment. Moreover, the court of appeals erred in its assumption (Pet. App. 5a, 18a-19a) that CHS could not have communicated with HCFA on this matter and thus was forced to depend on the intermediary's advice; we are aware of no written or unwritten policy that prohibits a provider from submitting nonroutine inquiries to HCFA, and such inquiries are not uncommon. CHS itself appears to have acknowledged below that providers are not precluded from contacting the Secretary directly. See *id.* at 15a.

imbursement for the same expenses.[11] The Secretary has created a limited exception to the rule concerning offset of earmarked grants in the case of "seed money" grants, which are defined as grants made for the purpose of establishing or expanding health care agencies.[12] Neither the regulation nor the description of

[11] 42 C.F.R. 405.423(c)(2) provides:

> Donor-restricted funds which are designated for paying certain hospital operating expenses should apply and serve to reduce these costs or group of costs * * *. If such costs are not reduced, the provider would secure reimbursement for the same expense twice; it would be reimbursed through the donor-restricted contributions as well as from patients and third-party payers including the title XVIII health insurance program.

[12] The Medicare Provider Reimbursement Manual, HIM-15, Pt. I, § 612.2, reproduced in 1 Medicare & Medicaid Guide (CCH) ¶ 5461 (Aug. 1968), provides:

> Grants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as "seed money" grants. "Seed money" grants are not deducted from costs in computing allowable costs. These grants are usually made to cover specific operating costs or group of costs for services for a stated period of time. During this time, the provider will develop sufficient patient caseloads to enable continued self-sustaining operation with funds received from Medicare reimbursement as well as from funds received from other patients or other third-party payers.

Section 612 is entitled "Public Health Service Grants." As the Manual indicates, "seed money" grants generally are one-time grants. Examples include grants under the Health Underserved Rural Areas program, 42 U.S.C. (Supp. V) 1310, and grants under the Rural Health Initiative Program, 42 U.S.C. (& Supp. V) 254c. Part A Intermediary Letter No. 79-47, reproduced in [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,110 (Dec. 1979).

the "seed money" exception found in the Medicare Provider Reimbursement Manual makes any mention of an exception for CETA grants. In addition, CETA grants do not fit the definition of seed money, since they are not designated for the development of new health care agencies or for expansion of services of established agencies (see note 12, *supra*).[13] Finally, as the district court found (Pet. App. 42a), the fact that CHS was receiving double payment for the expenses of hiring CETA employees should have been a "red flag" to CHS. Thus, CHS clearly had reason to question the intermediary's advice. Indeed, the fact that CHS claims to have consulted the intermediary on a number of occasions about the treatment of CETA funds (see page 9, *supra*) suggests that it had continuing doubts about the advice it was receiving.

On this record, it is apparent that CHS failed to demonstrate reasonable reliance as a matter of

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[13] CETA funds were not directed specifically to health care agencies, but were intended to "provide job training and employment opportunities for economically disadvantaged unemployed and underemployed persons * * *." See 29 U.S.C. (Supp. V) 801. The district court noted that "no tortured construction" could bring CETA grants within the seed money exception (Pet. App. 40a).

CHS contended below that CETA funds should be considered to be seed money, because the contract under which it received the funds stated that they would be used to supplement, rather than supplant, the level of funds otherwise available. See Pet. App. 51a. However, the statutory condition referred to in the contract, Section 703(11) of CETA, makes clear that the reference is to supplementation of *non-federal* sources of funds. See 29 U.S.C. 983(11) (formerly Title VI, Section 603(11) of Pub. L. No. 92-203, 87 Stat. 878).

law. Reliance on erroneous advice can never be reasonable if (1) such reliance is inconsistent with a statutory or regulatory system under which erroneous determinations are reopened and corrected; or (2) the advice received appears to be inconsistent with the terms of a statute, published regulation, or written instruction accessible to the recipient. Under the law governing estoppel of private parties, there can be no estoppel unless the party asserting the estoppel lacks both knowledge and the means of knowledge of the truth about the facts in question. See *Goodwin* v. *Hartford Life Insurance Co.*, 491 F.2d 332 (3d Cir. 1974) (declining to estop an insurance company from denying liability where eligibility for coverage was defined in the insurance policy and contract); *In re Watt Estate*, 409 Pa. 44, 65-66, 185 A.2d 781, 792 (1962).

Those dealing with the federal government are charged with knowledge of federal statutes and regulations. *FCIC* v. *Merrill*, 332 U.S. at 384-385; *Cooke* v. *United States*, 91 U.S. 389, 401-402 (1875); *Wolfson* v. *United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974); 44 U.S.C. 1507. It is not unreasonable to expect that such persons will familiarize themselves with the governing law and will act on the basis of that authority. Statutes and regulations give fair warning to those who deal with an agency that it would be inappropriate to accord undue weight to initial determinations of an agency representative, since such determinations may well be overruled at some point. It is, in short, difficult to imagine any circumstances in which reliance on erroneous advice of a government representative would be reasonable in the situations we have described.

2. CHS also failed to demonstrate another element necessary to estoppel of a private party—that it would suffer detriment if the Secretary were not estopped. Absent estoppel CHS would be required to repay the Medicare funds it received as a result of its failure to offset CETA grant funds against the costs of CETA employees in its Medicare cost reports. But that result cannot qualify as detriment for purposes of estoppel. Because the Secretary has determined that the funds at issue here are not "reasonable costs" within the meaning of the Medicare statute, CHS never had any right to receive the funds. See pages 23 n.7, 31-32, *supra*. In fact, CHS has been reimbursed twice by the federal government for the salaries and fringe benefits it paid to CETA workers, once with CETA funds and again with Medicare funds. Requiring CHS to return the Medicare payments to which it was never entitled simply does not amount to detriment. In fact, quite the reverse is true; allowing CHS to retain the Medicare payments gives it a windfall.

The court of appeals found it significant that CHS had incurred obligations based on the advice it received (*i.e.*, that it had claimed the Medicare funds and used them for non-Medicare purposes) (Pet. App. 2a, 19a). CHS asserted below that it had used the extra funds it received for worthy purposes, *i.e.*, to render health care services to the public. But it would be entirely inappropriate to preclude the Secretary from carrying out Congress's express directive to recover Medicare overpayments simply because the recipients of such funds had spent them. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 14 n.15 ("we would find it difficult to believe that Congress meant to permit States to obtain

good title to funds otherwise owing to the Federal Government by the simple expedient of spending them"). Of course, no one required or even "induced" CHS to expend the excess funds it received; ultimately, it was CHS's choice to take the risk of doing so, in the knowledge that the statute requires that retroactive adjustments be made in the case of overpayments.

CHS contends that it is unable to repay the excess Medicare funds it received and that it would have to cease or curtail services to its clients if it were required to repay. See, *e.g.*, Br. in Opp. 13 ("recoupment of the alleged overpayments would likely cause CHS to close its doors").[14] The court of appeals appears to have been particularly impressed by this contention. Pet. App. 21a. However, CHS's assertion relates to the propriety of the Secretary's recoupment methods rather than the validity of recoupment itself. See *Bell* v. *New Jersey*, slip op. 5 n.4. Moreover, the court of appeals overlooked the fact that there are ways to avoid the dire consequences predicted by CHS. When Travelers notified CHS that it was required to repay the excess funds it had received, it advised CHS of the option of an extended repayment schedule and requested financial information that would support such repayment terms (C.A. App. 25a-26a). CHS apparently did not pursue this possibility, which could have alleviated its financial concerns.[15]

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[14] But see the testimony of CHS's director before the PRRB (Tr. 61; PRRB Record at 134), noting that for the 1979-1980 fiscal year CHS had a budget of $900,000.

[15] See also the Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.* (authorizing compromise of a claim or termination of collection action under certain conditions, including inability to pay, in appropriate cases).

In sum, recoupment of erroneously paid funds to which the recipient has no statutory entitlement rarely, if ever, can constitute the sort of detriment required to support estoppel. In the long run, a party that must repay such funds is in no worse position than if it had never received the funds in the first place. Principles of equity surely do not require estoppel in cases in which the result would be a financial windfall for the recipient of erroneously paid funds.

C. Assuming Arguendo That CHS Made A Threshold Showing Sufficient To Warrant Estoppel Of A Private Party, This Case Does Not Satisfy Any "Affirmative Misconduct" Exception To The General Rule That The Federal Government May Not Be Estopped

Even if CHS had made a showing sufficient to support estoppel of a private party, it could not prevail, because it is the federal government, rather than a private party, that CHS seeks to estop. See pages 18-26, *supra*. Assuming arguendo that estoppel of the government may be appropriate in some circumstances, a party clearly must show more than the traditional elements applicable to estoppel in private litigation. CHS has not made such an additional showing.

1. In several cases this Court has declined to decide whether "affirmative misconduct" by a government representative might justify an exception to the general principle that the federal government may not be equitably estopped. See *INS* v. *Miranda*, slip op. 3, 5; *Schweiker* v. *Hansen*, 450 U.S. at 788; *INS* v. *Hibi*, 414 U.S. at 8. See also *Montana* v. *Kennedy*, 366 U.S. at 315. The Court has never identified a case in which the facts established the sort of

misconduct that might warrant estoppel. Nevertheless, in this case and others involving claims of estoppel against the federal government, the lower courts have seized on statements in this Court's decisions as support for an "affirmative misconduct" exception. See, *e.g.*, Pet. App. 10a (stating that the Supreme Court has "acknowledged that estoppel may be properly applied against the government under certain circumstances" and has given "tacit recognition" to the theory of estoppel because of the affirmative misconduct of a governmental official). The lower courts have purported to find "affirmative misconduct" by the government in a variety of circumstances.[16]

The notion that there may be an "affirmative misconduct" exception to the general rule that the federal government may not be estopped appears to have

[16] In addition to this case, see, *e.g.*, *Miranda* v. *INS*, 673 F.2d 1105 (9th Cir. 1982), rev'd, No. 82-29 (Nov. 8, 1982) (failure of INS to act on visa petition for 18-month period); *United States* v. *Wharton*, 514 F.2d 406 (9th Cir. 1975) (erroneous advice concerning possibility of filing application to obtain title to land); *Tennessee ex rel. Leech* v. *Dole*, 567 F. Supp. 704, 721 (M.D. Tenn. 1983), appeal pending, No. 83-549 (6th Cir.) (allegedly inconsistent positions taken by Department of Justice and Department of Transportation with respect to state's obligation to reimburse federal government from state's recovery of overcharges from highway project bid-riggers); *Hanover Building Materials, Inc.* v. *Guiffrida*, C.A. No. A-81-CA-426 (W.D. Tex. May 9, 1983), appeal pending, No. 83-1471 (5th Cir.) (payment of flood insurance claims not authorized by regulation and continued acceptance of premiums); *McDonald* v. *Schweiker*, 537 F. Supp. 47 (N.D. Ind. 1981) (erroneous representation that plaintiff needed additional calendar quarters of work in order to apply for benefits); *Armstrong* v. *United States*, 516 F. Supp. 1252 (D. Colo. 1981) (erroneous advice concerning plaintiff's active duty status and eligibility for benefits).

originated in *Montana* v. *Kennedy*, 366 U.S. at 315 n.11, in which the Court cited two court of appeals decisions, *Podea* v. *Acheson*, 179 F.2d 306 (2d Cir. 1950), and *Lee You Fee* v. *Dulles*, 236 F.2d 885, 887 (7th Cir. 1956), rev'd, 355 U.S. 61 (1957). In *Podea*, the court held that the plaintiff could not be deprived of his citizenship on the ground that he had served in the Rumanian army, despite the terms of the applicable statute, since he had been required to remain in Rumania because the State Department had erroneously denied him a passport. In *Lee You Fee*, the court observed in dictum that the government "should not be heard to contend that a plaintiff had been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or willfully prevented his doing." 236 F.2d at 887.[17]

Both *Podea* and the dictum in *Lee You Fee* concerned United States citizens who allegedly had forfeited their citizenship as a result of erroneous actions by government officials. Neither decision mentioned the principle of estoppel. However, the Court in *Montana* v. *Kennedy* cited those decisions in connection with its comment that "we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." 366 U.S. at 315. The Court concluded that the conduct at issue in *Montana*—an

[17] The court in *Lee You Fee* cited its earlier holding in *Lee Wing Hong* v. *Dulles*, 214 F.2d 753 (7th Cir. 1954), that an individual did not lose his citizenship through failure to establish residence in the United States prior to his sixteenth birthday when that failure resulted from erroneous denial of a passport by government officers.

official's erroneous advice to petitioner's mother that she could not travel to the United States because she was pregnant—fell "far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth." *Id.* at 314-315.

Subsequently, in *INS* v. *Hibi*, 414 U.S. at 8, and *Schweiker* v. *Hansen*, 450 U.S. at 788, the Court characterized *Montana* v. *Kennedy* as leaving open the question whether "affirmative misconduct" on the part of the government might estop it from denying citizenship. However, in both *Hibi* and *Hansen* the Court again concluded that the conduct before it—failure to publicize certain rights to naturalization and to have a naturalization representative present in the Philippines for a period of time (*Hibi*) and erroneous advice concerning availability of social security benefits and failure to advise an individual to file a written application for benefits (*Hansen*)—clearly did not amount to affirmative misconduct, so that there could be no estoppel in any event. In *INS* v. *Miranda*, slip op. 3, the Court stated that the court of appeals was correct in considering initially whether there had been a showing of affirmative misconduct. However, the Court once again concluded that the conduct at issue (delay in processing a visa petition) did not constitute affirmative misconduct and that it therefore was not required to decide whether affirmative misconduct would estop the government from enforcing the immigration laws (slip op. 5).

2. In our view there should be no "affirmative misconduct" exception to the doctrine that the government may not be equitably estopped. As we explained at pages 20-25, *supra*, the doctrine is designed to protect the federal government from the consequences of error or misconduct by its representatives. In par-

ticular, the doctrine ensures that the actions of Executive Branch employees do not have the effect of overriding Congress's will. Estoppel of the federal government undermines these purposes whether a government representative's actions are merely negligent or rise to some unspecified higher level of affirmative misconduct. In fact, it could be contended that the more egregious the conduct of a government employee, the less justification there is for estopping the government. If an employee engages in serious misconduct, it is clear that the agency could not have intended to allow him to bind the government. It seems anomalous for courts to hold that agencies are bound by the actions of their representatives in those situations—and only those situations—in which there can be no doubt that the responsible agency officials did not approve (and would never have approved) the representatives' actions.

The "affirmative misconduct" exception, as it has been embraced and applied by the lower courts, has proven less than successful. There is no generally accepted standard for what constitutes affirmative misconduct, and courts have expressed confusion about the meaning of the term. See *Schweiker* v. *Hansen*, 450 U.S. at 792 (Marshall, J., dissenting). Perhaps the most troublesome problem is that the term "affirmative misconduct" sounds flexible enough to encompass a wide variety of actions. This Court's decisions seem to indicate that misconduct must be quite serious before it would be sufficient to estop the government. However, as in *Hibi*, *Hansen* and *Miranda*, a court that seeks to shift a loss from a seemingly sympathetic private party to the federal government may label as "affirmative misconduct" actions that appear to be merely negligent or even ac-

tions that are in no way wrongful. Like the court of appeals in this case (see Pet. App. 16a-21a), the lower courts may conclude that affirmative misconduct exists because the facts of the case at hand can be distinguished in some manner from the facts of the cases in which this Court has declined to find affirmative misconduct.

In sum, we believe that the "affirmative misconduct" exception, which has been nourished in part by dictum in this Court's decisions, has proven unsatisfactory and unworkable in practice. It is inconsistent with the theoretical underpinnings of the general rule against estoppel of the federal government, and it has generated needless litigation and incorrect decisions. If the Court chooses not to disclaim the "affirmative misconduct" concept entirely, we urge that it at least emphasize the very limited nature of such an exception in view of the significant public policy concerns weighing against estoppel of the government.[18]

3. If the Court were to apply an "affirmative misconduct" exception to the general rule that the government may not be equitably estopped, the facts of this case clearly would not fit such an exception. The court of appeals characterized Travelers as having engaged in affirmative misconduct because its Medicare Manager erroneously advised CHS that the amounts it claimed for CETA salaries and fringe

[18] In addition to stressing the requirement that a party comply strictly with the traditional standards for estoppel in private litigation, it would be appropriate to emphasize that a finding of affirmative misconduct may not be based on mere negligence in rendering erroneous advice or on an agency's silence or acquiescence in the face of wrongful actions by the party asserting estoppel.

benefits were allowable and because it failed from 1975 to 1977 to consult HCFA about the proper treatment of CETA funds. Pet. App. 15a. But such actions and omissions do not reach the level of "affirmative misconduct." At worse, they amount to negligence. The district court concluded (*id.* at 46a) that the intermediary's actions did not amount to "willful or wanton misconduct," but at most constituted a mistake in judgment.[19]

The conduct in this case is essentially indistinguishable from conduct involved in prior decisions in which this Court has declined to estop the government. In

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[19] It is worth noting that when Congress enacted the Federal Tort Claims Act, it expressly exempted the United States from "[a]ny claim arising out of," inter alia, "misrepresentation" or "deceit." 28 U.S.C. 2680(h).

The court of appeals placed considerable weight on its conclusion that the intermediary failed to carry out what the court referred to as a "legally binding procedure"—consultation with HCFA on matters not settled by statute or regulation (Pet. App. 15a-16a). The Medicare statute, 42 U.S.C. (Supp. V) 1395h(a), states that agreements between the Secretary and intermediaries may provide that the intermediary will serve as a channel of communication between providers and the Secretary, and the agreement between Travelers and the Secretary did contain such a provision. See Br. in Opp. 5. However, there is no indication that Congress intended to impose a duty that would be enforceable by providers (as opposed to the Secretary) in individual instances or that could operate to estop the Secretary from recovering overpayments made to providers. Cf. *Schweiker* v. *Hansen*, 450 U.S. at 789-790; *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979). Indeed, the Medicare statute appears to indicate that the Secretary herself could not hold an intermediary liable for payments it certifies in the absence of gross negligence or intent to defraud the United States. See 42 U.S.C. (Supp. V) 1395h(g).

FCIC v. *Merrill*, *supra*, a government agent incorrectly informed a wheat farmer that his crop would be federally insured, although applicable regulations clearly provided that the crop was not insurable. In *Schweiker* v. *Hansen*, *supra*, a Social Security claims representative incorrectly informed a claimant that she did not qualify for insurance benefits under 42 U.S.C. (& Supp. V) 402(g) and failed to advise her that she should file a written application for benefits, although instructions in the Social Security Claims Manual indicated that claims representatives should give such advice. The Court in *Hansen* concluded that the government representative's erroneous advice and failure to take steps to discover correct information fell " 'far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with [a] valid regulation." *Schweiker* v. *Hansen*, 450 U.S. at 790, quoting *Montana* v. *Kennedy*, 366 U.S. at 314.[20] *Hansen* and *Merrill* compel the conclusion that the intermediary's conduct in this case—rendering erroneous advice and failing to consult HCFA about that advice from 1975 to 1977—does not constitute affirmative misconduct that would warrant estopping the Secretary from performing her statutory obligation to recover Medicare overpayments from CHS.

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[20] See also, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. at 183 (erroneous interpretation of tax law by IRS Commissioner does not estop him from applying a subsequent correct ruling retroactively); *United States* v. *San Francisco*, 310 U.S. at 31-32 (administrative interpretation by Interior Department was not a bar to enforcement of the provisions of the Raker Act); *Wisconsin C. R.R.* v. *United States*, 164 U.S. 190, 212 (1896) (overpayment of funds in derogation of statute was not a bar to the government's action to recover those funds).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 427273 172